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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ANTONIO BORQUEZ, Defendant and Appellant.	H026847 (Santa Clara County Super. Ct. No. CC320325)

Appellant was charged by information in Santa Clara County with one count of attempting by threats of force or violence to deter an officer from performing an official duty (Pen. Code, § 69, count one); one count of possession of ammunition by a prohibited person (Pen. Code, § 12316, subd. (b), count two); one count of giving a false name (Pen. Code, § 148.9, count three); one count of public intoxication (Pen. Code, § 647, subd.(f), count four); and one count of attempting to dissuade a witness by means of force or threats (Pen. Code, § 136.1, subd. (c)(l), count five).[1] In addition, the information alleged that appellant had served a prior prison term. (Pen. Code, § 667.5, subd (b).)[2]

Jury trial began on October 16, 2003.

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[1] Later, the People dismissed count four. For trial purposes only, count five was renumbered count four.

[2] Unless otherwise noted, all subsequent statutory references are to the Penal Code.

On October 24, 2003, the jury found appellant guilty of possession of ammunition by a prohibited person and of attempting to dissuade a witness (counts two and four). In addition, the jury found true the allegation that appellant had served a prior prison term. The jury acquitted appellant, however, on counts one and three.

On December 12, 2003, the court imposed a two-year term for the possession of ammunition, a three-year term for the count of threatening a witness, and a one-year term for the prior prison term for a total of six years in state prison.

On January 5, 2004, appellant filed a notice of appeal.

On appeal, appellant raises two issues. First, he contends that the evidence was "legally insufficient to sustain [his] conviction of attempting to dissuade a witness." Second, an order for attorney fees must be stricken because the trial court made no finding of his present ability to pay.

Facts and Proceedings Below

Prosecution Case

At about 10 p.m. on July 20, 2003, Officer Mauricio Jimenez was dispatched to the scene of a suspected vehicle burglary. When he arrived at the scene, he saw appellant about a half a block away. Appellant was drinking a bottle of beer. Another patrol vehicle came along and blocked the street. Initially, appellant was cooperative and identified himself as Chris Borquez.

Officer Jimenez noticed that appellant had bloodshot eyes, a strong odor of alcohol emanated from his mouth, and he had an unsteady gait. The officer pat-searched appellant for weapons and asked him to pull up his jacket. Officer Jimenez saw a knife in appellant's pocket. He took it from appellant and put it in his own pocket. He arrested appellant for being intoxicated in public.

After he placed appellant under arrest and handcuffed him, Officer Jimenez searched appellant's pockets; a nine-millimeter bullet fell out. Appellant told Jimenez his

true name and when Jimenez learned appellant had a prior felony conviction, he arrested appellant for possession of the bullet and for giving a false name.

At trial, the parties stipulated that appellant had a prior felony conviction and that he was statutorily barred from possessing ammunition.

When Jimenez told appellant he was under arrest, and the reason for the arrest, appellant became angry. When he was in the patrol car, he told Jimenez, "You are a bitch. I burglarized a house and you can't get me for it" Appellant threatened to shoot him. According to Jimenez, appellant said that he was only going to do 11 months in prison "and he will be out and ---." Appellant continued to make threats to Jimenez. When he asked Jimenez for his name and badge number, he told him that when he finds out, "I am going to shoot your f . . . g head off." Jimenez stated that this was the "most extreme" threat he had ever faced.

Jimenez asked appellant if he was threatening him. Appellant said he did not have to threaten him; the officer was going to "get shot." Appellant stated that when he gets out of prison he was going to rob Jimenez's house. In addition, he said "I rape bitches like you in prison." Appellant made other threats, but Jimenez did not recall the specific language appellant used. When Jimenez told appellant his name and badge number, appellant repeated them to himself.

Jimenez did not remember if appellant asked him to release him, or not to write a report. Appellant did not ask him not to proceed with the prosecution.

At trial, the parties stipulated that it is difficult to get information as to where peace officers live, but that it is not impossible so to do.

Defense Case

Appellant testified in his defense. He claimed that Jimenez pulled out a bullet from his own pocket and said, "[W]hat's this?" When he asked Jimenez for his badge number, Jimenez covered it and laughed at him. He denied making any threats or telling Jimenez not to write a police report.

Discussion

Sufficiency of the Evidence

Appellant argues that his conviction for violating section 136.1 is not supported by substantial evidence.

In addressing a challenge to the sufficiency of the evidence supporting a conviction, we examine the "whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value —such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.]" (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We presume in support of the judgment "the existence of every fact the trier could reasonably deduce from the evidence. [Citations.]" (*Ibid*.)

Section 136.1 provides: "(a) Except as provided in subdivision (c), any person who does any of the following is guilty of a public offense and shall be punished by imprisonment in a county jail for not more than one year or in the state prison: [¶] (1) Knowingly and maliciously prevents or dissuades any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law. [¶] (2) Knowingly and maliciously attempts to prevent or dissuade any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law. [¶] (3) For purposes of this section, evidence that the defendant was a family member who interceded in an effort to protect the witness or victim shall create a presumption that the act was without malice. [¶] (b) Except as provided in subdivision (c), every person who attempts to prevent or dissuade another person who has been the victim of a crime or who is witness to a crime from doing any of the following is guilty of a public offense and shall be punished by imprisonment in a county jail for not more than one year or in the state prison: [¶] (1) Making any report of that victimization to any peace officer or state or local law enforcement officer or probation or parole or correctional officer or prosecuting agency or to any judge. [¶] (2) Causing a complaint, indictment,

information, probation or parole violation to be sought and prosecuted, and assisting in the prosecution thereof. [¶] (3) Arresting or causing or seeking the arrest of any person in connection with that victimization. [¶] (c) Every person doing any of the acts described in subdivision (a) or (b) knowingly and maliciously under any one or more of the following circumstances, is guilty of a felony punishable by imprisonment in the state prison for two, three, or four years under any of the following circumstances: [¶] (1) Where the act is accompanied by force or by an express or implied threat of force or violence, upon a witness or victim or any third person or the property of any victim, witness, or any third person. [¶] (2) Where the act is in furtherance of a conspiracy. [¶] (3) Where the act is committed by any person who has been convicted of any violation of this section, any predecessor law hereto or any federal statute or statute of any other state which, if the act prosecuted was committed in this state, would be a violation of this section. [¶] (4) Where the act is committed by any person for pecuniary gain or for any other consideration acting upon the request of any other person. All parties to such a transaction are guilty of a felony. [¶] (d) Every person attempting the commission of any act described in subdivisions (a), (b), and (c) is guilty of the offense attempted without regard to success or failure of the attempt. The fact that no person was injured physically, or in fact intimidated, shall be no defense against any prosecution under this section. [¶] (e) Nothing in this section precludes the imposition of an enhancement for great bodily injury where the injury inflicted is significant or substantial. [¶] (f) The use of force during the commission of any offense described in subdivision (c) shall be considered a circumstance in aggravation of the crime in imposing a term of imprisonment under subdivision (b) of Section 1170.

Consequently, appellant argues that the prosecution was required to prove either that he had the specific intent to dissuade Officer Jimenez from attending or giving testimony at trial or other proceeding (§ 136.1, subd. (a)(1)), or the specific intent to dissuade Officer Jimenez from causing a complaint, indictment, information, probation or

parole violation to be sought and prosecuted, and assisting in the prosecution thereof (§ 136.1, subd. (b)(2)); and that this was accompanied by force or threat of force or violence (§ 136.1, subd. (c)(1)).

Section 136.1 proscribes preventing or dissuading a witness or victim from testifying or doing other enumerated acts. Unless the defendant's acts or statements are intended to affect or influence a potential witness's or victim's testimony or acts, no crime has been committed under this section. (*People v. Ford* (1983) 145 Cal.App.3d 985, 989.) Since the definition refers to a defendant's intent to achieve some further or additional consequence, section 136.1 is a specific intent crime. (*Id.* at p. 990.)

Appellant concedes that there is no talismanic phrase required in order to be found to have violated section 136.1, but argues that the act or statement must support an inference that he intended to dissuade a witness from reporting the offense or testifying.

The statements attributed to appellant could be interpreted as simple angry statements of impending revenge,[3] or as a threat intended to preclude Officer Jimenez from testifying or from dissuading him from causing a complaint or information to be filed. The test on appeal, however, is not whether the evidence establishes guilt beyond a reasonable doubt but whether the evidence could persuade *any* reasonable jury to have found guilt beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) Words "carry with them an inherent baggage of connotation . . . ." (*People v. Ford*, *supra*, 145 Cal.App.3d at p. 989.) They must be viewed in light of the surrounding circumstances. Appellant was aware that Officer Jimenez was a potential witness against him and had the power to proceed with the arrest. The jury could rationally interpret appellant's remarks to Officer Jimenez as a warning or threat not to testify in the future or

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[3] We recognize that even a simple statement of impeding revenge carries with it the implication that if the person discontinues their current course of conduct, the revenge will not materialize.

proceed with the arrest. To reverse a conviction for insufficiency of the evidence it must " 'clearly appear that upon no hypothesis whatever is there sufficient substantial evidence to support it.' " (*In re Frederick G*. (1979) 96 Cal.App.3d 353, 363.)

Since the jury could rationally have interpreted appellant's threats to Officer Jimenez as a warning or threat not to testify or proceed with the arrest, we find appellant's conviction supported by substantial evidence.

Attorney Fees

At appellant's sentencing hearing, the trial court ordered attorney fees of $3000. Defense counsel objected stating, "I don't believe Mr. Borquez is going to be able to afford $3,000 in attorney fees. . . . I think it's excessive." The trial court responded, "Understood. The services you provide[d] to Mr. Borquez is probably in the neighborhood of $20,000 and I think 3,000 is appropriate."

Appellant contends that the order for attorney fees must be stricken because the court made no finding of his present ability to pay.

The People concede that the court did not determine appellant's ability to pay, but contend that the case must be remanded to the trial court to correct this error.

The statutory procedure for determining a criminal defendant's ability to reimburse the county for the services of court-appointed counsel is set forth in section 987.8. Under this statute, a court may order a defendant, who has the *present* ability to pay, to reimburse the county for the costs of legal representation. However, the defendant must be given notice and afforded specific procedural rights, including the right to present witnesses at the hearing and to confront and cross-examine adverse witnesses. (§ 987.8, subd. (b); *People v. Poindexter* (1989) 210 Cal.App.3d 803, 809-810.)

Section 987.8, subdivision (b) provides, "the court may, after notice and a hearing, make a determination of the *present ability of the defendant to pay all or a portion of the cost*" of legal assistance provided through "the public defender or private counsel appointed by the court." (Italics added.) Upon determining that the defendant does have

"the present ability to pay all or a part of the cost" of legal assistance, "the court shall set the amount to be reimbursed and order the defendant to pay the sum to the county . . . ." (§ 987.8, subd. (e).)

Section 987.8, subdivision (g)(2) sets forth the definition of "ability to pay" and the factors the court must consider in making that determination. " 'Ability to pay' means the overall capability of the defendant to reimburse the costs, or a portion of the costs, of the legal assistance provided to him or her, and shall include, but not be limited to, all of the following: [¶] (A) The defendant's present financial position. [¶] (B) The defendant's reasonably discernible future financial position. In no event shall the court consider a period of more than six months from the date of the hearing for purposes of determining the defendant's reasonably discernible future financial position. Unless the court finds unusual circumstances, a defendant sentenced to state prison shall be determined not to have a reasonably discernible future financial ability to reimburse the costs of his or her defense. [¶] (C) The likelihood that the defendant shall be able to obtain employment within a six-month period from the date of the hearing. [¶] (D) Any other factor or factors which may bear upon the defendant's financial capability to reimburse the county for the costs of the legal assistance provided to the defendant."

A finding of a present ability to pay need not be express. It may be implied through the content and conduct of the hearings. (*People v. Phillips* (1994) 25 Cal.App.4th 62, 71.) In addition, we presume that the trial judge knew, and was acting in accord with, the dictates of the law. Evidence Code section 664 provides, in pertinent part: "It is presumed that official duty has been regularly performed." This presumption is applicable to the discharge of adjudicative duties. (See *People v. Visciotti* (1992) 2 Cal.4th 1, 49.) We need not decide this issue, however, because we agree with appellant's argument that, even assuming the trial court made an implied finding of ability to pay, that order cannot be upheld because it is not supported by substantial evidence.

A determination that a defendant has the *present* ability to pay is a prerequisite for entry of an order for attorney fees. (§ 987.8, subd. (e).) As noted, while such a determination may be implied, the order cannot be upheld on review unless it is supported by substantial evidence. (*People v. Nilsen* (1988) 199 Cal.App.3d 344, 347.)

To support his claim that there is not substantial evidence of his present ability to pay, appellant argues that he was sentenced to prison for six years, and there is "no evidence in the record whatsoever of any possible unusual circumstances in this case." There was no evidence that he had any assets, and he had the obligation to pay $2,400 in other fines. Furthermore, "[w]ith a six year sentence his 'reasonably discernible future financial position' was presumed to be that he did not have the ability to pay within six months." Accordingly, there was no evidence presented to refute the statutory presumption that he lacked the present ability to pay attorney fees.

There is a presumption under section 987.8 that a defendant sentenced to prison does not have the ability to reimburse the costs of his defense. Section 987.8, subdivision (g)(2)(B) provides: "Unless the court finds unusual circumstances, a defendant sentenced to state prison shall be determined not to have a reasonably discernible future financial ability to reimburse the costs of his or her defense." Here, the trial court sentenced defendant to six years in state prison.

As part of the "SOCIAL DATA" portion of the probation report, the report indicates that appellant had been working as a warehouse manager with a net pay of $12.50 per hour from 1998-2003. There is no indication as to whether this was a full or part-time position. Moreover, there is some indication in the report that this was not continuous employment.[4] Furthermore, nothing in the probation report suggests appellant has savings or any other assets.

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[4] The report indicates that appellant was released from prison on February 11, 2001.

Accordingly, we conclude that, here, as in *People v. Kozden* (1974) 36 Cal.App.3d 918, 920, "there is no substantial evidence to support the trial court's [implied] determination that [appellant] possessed the *present ability* to pay the sum assessed."

The People argue that while "one sentenced to a term greater than six months would presumably not be required to pay attorney fees, absent evidence of existing means or other anticipated sources of income, the record does not affirmatively show whether unusual circumstances might exist that would enable the court to assess attorney's fees." Accordingly, the People urge this court to remand to the trial court to afford appellant the required notice and hearing.

In certain circumstances, a remand to determine ability to pay and then imposition of an attorney fees order might be appropriate. However, in this case a remand could cost more than the fees would generate. As a result, in this case we adopt a more pragmatic approach.[5]

Since the record contains insufficient evidence to support the trial court's implied finding as to appellant's ability to pay the attorney fees, we will strike the order that directed appellant to pay attorney fees of $3000.

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[5] Given the fact that appellant has only an eleventh grade education and there is no evidence that he possesses any high paying skills, to assume that there "might exist" unusual circumstances that would enable the trial court to assess attorney fees, seems to be a futile exercise.

Disposition

The attorney fees order is stricken. In all other respects, the judgment is affirmed.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.